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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT EAGLE ELK, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether a defendant's statement, made during a noncustodial polygraph examination that the defendant took with his attorney's consent and after receiving *Miranda* warnings, must be suppressed because prior to the making of the statement the examiner advised the defendant that the polygraph showed some of his responses to be deceptive.

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UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT EAGLE ELK, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 682 F.2d 168. The oral opinion of the district court (App. B, *infra*, 12a–14a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 15a) was entered on June 30, 1982. A petition for rehearing was denied on August 27, 1982 (App. D, *infra*, 16a). On October 18, 1982, Justice Blackmun extended the time in which to file a petition for a writ of certiorari to and including November 25, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent was indicted in the United States District Court for the District of South Dakota for voluntary manslaughter, in violation of 18 U.S.C. 1153 and 1112. The victim, Richard Schreiner, was killed during an altercation with respondent; respondent contended at trial that another person present at the altercation was responsible for Schreiner's death. App. A, *infra*, 1a-2a.

Respondent was first interviewed, by the Oglala Sioux Tribal Police, on the night of Schreiner's death. Before questioning him, the Tribal Police fully advised respondent of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Three days later, respondent was arrested, arraigned, and released on bond. App. A, *infra*, 3a & n. 2. Almost two months after his release on bond, respondent, on the advice of counsel, volunteered to take a polygraph examination administered by the FBI. Before beginning the examination, the examiner again gave respondent *Miranda* warnings, and respondent signed a form waiving his *Miranda* rights. He also signed a form specifically consenting to the polygraph interview. App. A, *infra*, 3a.

At one point during the interview with the polygraph examiner, the examiner advised respondent that the polygraph indicated that some of his responses were deceptive. Respondent subsequently told the examiner that he had twice struck Schreiner on the head with a rifle. App. A, *infra*, 3a. The United States District Court for the District of South Dakota denied respondent's motion to suppress this incriminating statement (App. B, *infra*, 12a–14a), and a jury convicted respondent of the lesser included offense of involuntary manslaughter. App. A, *infra*, 1a.

The court of appeals rejected respondent's claim that the use of his statement was impermissible under

Edwards v. *Arizona*, 451 U.S. 477 (1981), but it held the statement inadmissible under its decision in *Fields* v. *Wyrick*, 682 F.2d 154 (1982), petition for cert. pending, No. 82-158 (filed July 26, 1982). The court of appeals explained (App. A, *infra*, 4a):

> [Respondent] contends that his incriminating statement should have been suppressed because, in the absence of an additional *Miranda* warning after the polygraph examination but prior to further interrogation, the statement must be viewed as not being voluntarily made. In light of this court's recent decision in *Fields* v. *Wyrick*, * * * we feel compelled to agree. * * * The relevant circumstances in *Fields* are virtually identical to those in the instant case.

The court accordingly reversed respondent's conviction "on the basis of" its decision in *Fields* (App. A, *infra*, 5a).

Judge Ross, in a separate opinion, "concur[red] in the result * * * only because I am firmly convinced that it is required by this court's recent broad holding in *Fields* v. *Wyrick*" (App. A, *infra*, 6a). Judge Ross reviewed the objections to the *Fields* decision that he had stated in his dissent in that case. He noted, for example, that the court's holdings that the statements given to the polygraph examiners were "involuntary" did not rely "on considerations of coercive conduct by the polygraph administrator, [the suspect's] age, intelligence, emotional condition, or any other factors which clearly would be relevant to a determination of whether he might not have voluntarily, knowingly, and intelligently made the incriminating statement or waived his right to have counsel present" (App. A, *infra*, 6a). Judge Ross also pointed out that in this case, as in *Fields*, "a defendant has clearly and fully been advised on at least two occasions prior to the administration of the polygraph of the constitutional rights to remain silent and to the presence of counsel during any questioning

* * *. I can find no evidence in any of these cases that the defendants did not fully comprehend the meaning and the consequences of a waiver of those rights" (App. A, *infra*, 10a).

Judge Gibson also concurred "only because *Fields* v. *Wyrick* * * * requires this action" (App. A, *infra*, 11a). He stated that he agreed with the reasoning of Judge Ross's opinion. *Ibid.*

REASONS FOR GRANTING THE PETITION

1. The court of appeals' decision is plainly incorrect. The stated basis for the court's decision is that respondent's statement was not voluntarily made. App. A, *infra*, 4a. But as Judge Ross noted, the court of appeals did not even purport to undertake the "careful evaluation of all the circumstances of the interrogation" needed to determine whether a statement is involuntary (*Mincey* v. *Arizona*, 437 U.S. 385, 401 (1978)). See, e.g., *Sims* v. *Georgia*, 389 U.S. 404, 407 (1967); *Clewis* v. *Texas*, 386 U.S. 707, 709-712 (1967); *Haynes* v. *Washington*, 373 U.S. 503, 513-515 (1963); *Culombe* v. *Connecticut*, 367 U.S. 568 (1961). Nor is it plausible to conclude that respondent's statement was "not 'the product of his free and rational choice'" (*Mincey* v. *Arizona*, *supra*, 437 U.S. at 401, quoting *Greenwald* v. *Wisconsin*, 390 U.S. 519, 521 (1968)), or that his "will was overborne" at the time he made the statement (*Lynumn* v. *Illinois*, 372 U.S. 528, 534 (1963)). Respondent was subjected only to the "pressure" of being confronted with the polygraph examiner's opinion that his previous statements were not wholly truthful.[1] This

[1] It should be noted in this connection that it is a relatively routine aspect of the administration of polygraph examinations that when the polygraph shows a response to be deceptive, the examiner will ask the examinee if there are any circumstances that might account for the polygraph's indication. The examiner

Court's decisions indicate that even confronting an accused with *false* "evidence" of a much more damaging character does not by itself render his responses inadmissible. See, e.g., *Oregon* v. *Mathiason*, 429 U.S. 492, 495-496 (1977); *Michigan* v. *Mosley*, 423 U.S. 96, 98 & n.3 (1975).

In *Fields*, the court of appeals emphasized the defendant's right to counsel. See, e.g., 682 F.2d at 157-158 ("Fields did not knowingly and intelligently waive his right to have counsel present at the interrogation * * *. [His] incriminating statements were, therefore, not voluntarily made * * *."). The court appeared to be referring to the Fifth Amendment "right" to counsel referred to in the *Miranda* warnings. See 6827.2d at 158. But that right attaches only when a suspect is in custody, and under *Oregon* v. *Mathiason*, *supra*, respondent plainly was not in custody at the time of his polygraph examination; he was free on bond, he reported voluntarily to the examination, and there is no suggestion that he could not terminate the examination and leave at any time, as indeed he had been told he could do.[2]

The court of appeals' decision also is not sustainable on the basis of respondent's Sixth Amendment right to counsel.[3] See generally *United States* v. *Henry*, 447 U.S. 264 (1980). Respondent's counsel agreed to allow respondent to be questioned about the crime by the

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makes this inquiry so that, for example, any ambiguity or other imperfection in the question can be corrected.

[2] The court of appeals' conclusion that the defendant in *Fields* was in custody at the time of the polygraph examination also appears to be inconsistent with *Oregon* v. *Mathiason*. See 682 F.2d at 158 n.6.

[3] We note that in *United States* v. *Jackson*, No. 82-1433 (8th Cir. Oct. 14, 1982), the court of appeals applied *Fields* and *Eagle Elk* to suppress statements made during a polygraph examination at a time when the defendant's Sixth Amendment right to counsel plainly had not attached.

FBI polygraph examiner in counsel's absence, and there is no indication that he received any assurances, subsequently violated, about the nature of the questioning. This case is thus diametrically opposed to *Brewer* v. *Williams*, 430 U.S. 387 (1977). The Court has never suggested that a suspect, having waived a right at the beginning of the interview, must waive the same right again with each new question or at each point when the tenor of the interview might be said to have changed.

2. A petition for a writ of certiorari to review *Fields* is now pending before the Court. *Wyrick* v. *Fields*, No. 82-158 (filed July 25, 1982). Although the court of appeals' decision in this case appears to be, if anything, less defensible than its decision in *Fields*,[4] we do not believe the two cases are materially different for purposes of this Court's exercise of discretionary review. Accordingly, we submit that the present petition should be disposed of as the Court deems appropriate in light of its disposition of *Fields*.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of the Court's disposition of *Wyrick* v. *Fields*, *supra*.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1982

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[4] In *Fields*, for example, the defendant may not have consulted with his attorney before attending the polygraph interview (see 682 F.2d at 156), although the court of appeals held that the defendant had clearly "waived his right to have counsel present while the examination itself was being conducted" (*id.* at 160).

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-2425

UNITED STATES OF AMERICA, APPELLEE,

v.

ROBERT EAGLE ELK, JR., A/K/A BOBBY BEAR, APPELLANT

Submitted May 20, 1982

Decided June 30, 1982

PER CURIAM

On May 21, 1981, the appellant, Robert Eagle Elk, Jr. was indicted for voluntary manslaughter under 18 U.S.C. §§ 1153 and 1112 (1976). On November 26, 1981, a jury returned a verdict of guilty on the lesser included offense of involuntary manslaughter, and the district court[1] entered judgment on December 11, 1981. Of the several trial court errors upon which Eagle Elk grounds this appeal only his assertion that the trial court erred in failing to suppress a statement that he made to a federal investigator following a polygraph examination concerns us on appeal. For the reasons set forth herein, we reverse.

Only a brief outline of the facts is necessary for purposes of this decision. Eagle Elk's conviction stemmed

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[1] The Honorable Andrew W. Bogue, Chief Judge, United States District Court for the District of South Dakota.

from the beating death of Richard Schreiner on April 25, 1981. Eagle Elk, Schreiner, and another individual, Anthony Jacobs, were traveling together on the evening of April 25, 1981, in Eagle Elk's automobile. Schreiner was carrying a rifle. Apparently, an argument broke out between Schreiner and Eagle Elk. According to Eagle Elk, Schreiner poked him in the side with the rifle, and Eagle Elk stopped the automobile. Schreiner jumped out of the car and while threatening Eagle Elk, cocked, aimed and pulled the trigger on the rifle. When the rifle failed to fire, Eagle Elk grabbed the rifle from Schreiner and struck him in the face with a fist. Schreiner then took out a pistol and cocked the pistol while again threatening Eagle Elk. Eagle Elk struck Schreiner on the left side of the neck with the butt of the rifle. The blow knocked Schreiner to the ground. At this point, he set the rifle next to the passenger side of the automobile and took cover.

Eagle Elk testified at trial that Jacobs became involved in the affray when, as Jacobs was attempting to get out of the back seat of the car, Schreiner pushed the car door and pinned Jacobs' legs between the car door and the car. A fight between Jacobs and Schreiner then ensued in which Jacobs, brandishing a knife, slashed at Schreiner. According to Eagle Elk, Jacobs then grabbed the rifle laying against the car and struck Schreiner in the head with the rifle, knocking him to the ground. Jacobs then smashed the rifle butt over Schreiner's head again with sufficient force to break the stock of the rifle into two pieces.

Anthony Jacobs denied that he participated in any way in the altercation. According to Jacobs, it was Eagle Elk who, after striking Schreiner in the face with his fist and knocking him to the ground, struck Schreiner in the head a total of four times with the butt of the gun.

After his arrest,[2] Eagle Elk, upon the advice of counsel, volunteered to undergo a polygraph examination on July 23, 1981. Eagle Elk's counsel was not present while the examination was being conducted. The examination was conducted by a Federal Bureau of Investigation officer, Agent Diem. Prior to being given the polygraph, Eagle Elk was advised by Agent Diem of his *Miranda* rights, signed a form stating that he understood those rights, and signed a polygraph interview consent form. The examination was conducted outside the presence of Eagle Elk's counsel. According to Eagle Elk, after the polygraph examination was completed, Agent Diem advised him that he was not telling the truth, and continued the interrogation. The government admitted that appellant was not given an additional *Miranda* warning after the polygraph examination but prior to this interrogation. During this interrogation Eagle Elk made an incriminating statement to the effect that he had struck Schreiner twice in the head with the rifle. According to Eagle Elk he requested to see his attorney prior to making this incriminating statement. However, Agent Diem testified at a suppression hearing held October 13, 1981, that Eagle Elk had not requested to see his attorney until after the incriminating statement had been made.

Eagle Elk argues that under *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), his incriminating statement allegedly made after requesting to see his counsel should have been suppressed. In *Edwards* the Supreme Court held that interrogation must cease when an accused requests counsel, and that an accused is not subject to further

[2] Eagle Elk was arrested on April 28, 1981. On April 25, 1981, the night of Schreiner's death, Eagle Elk had been interviewed by an investigator with the Oglala Sioux Tribal Police. Prior to this interview. Eagle Elk was fully advised of his constitutional rights. [Tr. 44]

interrogation unless he initiates further conversation with the police. *Id.* at 484-85, 101 S.Ct. at 1884-85. We do not believe *Edwards* controls the instant case in that at the suppression hearing the trial court accepted Agent Diem's testimony that Eagle Elk did not request an attorney until after he had made the incriminating statement. Such findings of fact by the trial court in suppression proceedings are subject to reversal only if they are found to be clearly erroneous, *see, e.g. United States v. Poitra*, 661 F.2d 98, 98 (8th Cir. 1981); *United States v. Doby*, 598 F.2d 1137, 1140 (8th Cir. 1979), and we cannot conclude on the basis of the record that the trial court made a clearly erroneous determination in the instant case.

However, Eagle Elk also contends that his incriminating statement should have been suppressed because, in the absence of an additional *Miranda* warning after the polygraph examination but prior to further interrogation, the statement must be viewed as not being voluntarily made. In light of this court's recent decision in *Fields v. Wyrick*, 682 F.2d 154 (8th Cir. 1982), we feel compelled to agree. In *Fields* this court reversed a rape conviction on the grounds that it was obtained as a result of an involuntary confession. The relevant circumstances in *Fields* are virtually identical to those in the instant case. Fields, upon the advice of counsel, consented to a polygraph examination to be conducted by an agent of the United States Army Criminal Investigation Division (CID). Fields' attorney was not present at the examination. Before the test was administered, Fields was fully advised of his constitutional rights and he signed a written form consenting to the polygraph examination. When the agent administering the examination advised Fields that the test indicated he was not telling the truth and subjected Fields to further interrogation without additional *Miranda* warnings, Fields made the incriminating

statement that he had engaged in consensual sexual intercourse with the eighty-one year old victim.

This court held that "Fields did not knowingly and intelligently waive his right to have counsel present at the interrogation described above. Fields' incriminating statements were, therefore, not voluntarily made and should have been suppressed." *Fields v. Wyrick*, *supra*, at 158. Without engaging in an extensive discussion of the court's reasoning which led to this conclusion, we simply note that we are unable to distinguish the relevant factual circumstances presented by the instant case from those in *Fields*. Therefore, on the basis of this court's decision in that case, we reverse appellant's conviction for involuntary manslaughter, and remand to the district court with directions to order the release of the appellant or provide a new trial within a reasonable period of time.[3]

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[3] As noted previously, Eagle Elk has raised several other issues on this appeal relating to rulings made by the district court during trial proceedings. In light of our reversal of Eagle Elk's conviction, we need not reach these other assignments of error. However, because Eagle Elk may undergo a second trial, at least brief mention should be made of the appellant's challenges to a district court ruling precluding the appellant from using Anthony Jacobs' prior conviction on petty theft for impeachment purposes.

Jacobs' conviction stemmed from the theft of gunpowder from his father's garage. The district court, citing *United States v. Fearwell*, 595 F.2d 771, 776 (D.C. Cir. 1978), refused to allow defendant to impeach Jacobs on the basis of his conviction because it determined that petit theft did not involve "dishonesty or false statement" as required under Fed. R. Evid. 609(a)(2). *Cf. United States v. Hayes*, 553 F.2d 824, 827 (2d Cir.), *cert. denied*, 434 U.S. 867, 98 S.Ct. 204, 54 L.Ed.2d 143 (1977) (dicta—petit larceny not admissible under Rule 609(a)(2)); *Government of Virgin Islands v. Testamark*, 528 F.2d 742, 743 (3d Cir. 1976) (petit larceny does not necessarily involve *crimen falsi* so as to be admissible for impeachment purposes). *But cf. United States v. Brown*, 603 F.2d 1022, 1029 (1st Cir. 1979)

ROSS, Circuit Judge, specially concurring.

I concur in the result in this case only because I am firmly convinced that it is required by this court's recent broad holding in *Fields v. Wyrick*, *supra*. Nevertheless, for the reasons stated in my dissenting opinion in *Fields*, I am steadfast in my belief that *Fields* was wrongly decided and inconsistent with this court's prior decision in *United States v. Little Bear*, 583 F.2d 411 (8th Cir. 1978).

The majority's conclusion in *Fields v. Wyrick* that the defendant's confession was involuntary does not rest on considerations of coercive conduct by the polygraph administrator, Fields' age, intelligence, emotional condition, or any other factors which clearly would be relevant to a determination of whether he might not have voluntarily, knowingly, and intelligently made the incriminating statement or waived his right to have counsel present. Instead, the majority relies solely on the facts that: (1) polygraph interrogation inherently holds "significant potential for abuse," *see Fields v. Wyrick*, *supra*, at 159; (2) even though Fields submitted to the polygraph upon the advice of his counsel, was fully advised of his constitutional rights and signed a written consent to the polygraph examination, there was "no evidence that Fields or his lawyer anticipated that the CID officer would attempt to elicit incriminating statements from Fields after the examination

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(petit larceny conviction could be used for impeachment); *United States v. Carden*, 529 F.2d 443, 446 (5th Cir.), *cert. denied*, 429 U.S. 848, 97 S.Ct. 134, 50 L.Ed.2d 121 (1976) (petit larceny admissible since it involved dishonesty). In the circumstances of this case we cannot conclude that the district court erred in refusing to admit Jacobs' prior petit theft convictions.

was run," *id.* at 160;[4] and (3) Fields was questioned immediately after administration of the polygraph without being reminded of his right against self-incrimination and his right to have counsel present. *Id.* at 160.

Thus, I am left with no alternative but to conclude that the majority in *Fields* has created a per se rule that, even though a defendant has been fully advised of his constitutional rights and has consented to a polygraph interrogation, his confession made after he has been advised that his polygraph examination shows deceit is involuntary unless the defendant is given an ad-

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[4] As I noted in my dissent in *Fields v. Wyrick*, 682 F.2d 154, at 162 (8th Cir. 1982) (Ross, J., dissenting), the following detailed statement of rights was read to Fields before the polygraph was administered:

> "Before I ask you any questions, you must understand your rights. *You do not have to answer my questions or say anything. Anything you say or do can be used as evidence against you in a criminal trial. You have a right to talk to a lawyer before questioning or have a lawyer present with you during the questioning.* This lawyer can be a civilian lawyer of your own choice, or a military lawyer, detailed for you at no expense to you. Also, you may ask for a military lawyer of your choice by name and he will be detailed for you if superiors determine he's reasonably available. *If you are now going to discuss the offense under investigation, which is rape, with or without a lawyer present, you have a right to stop answering questions at any time or speak to a lawyer before answering further, even if you sign a waiver certificate. Do you want a lawyer at this time?" Defendant answered "No."*

State v. Fields, 538 S.W.2d 348, 350 n.1 (Mo.Ct. App. 1976) (emphasis added).

Apparently, the majority in *Fields* has now engrafted an additional requirement that unless additional *Miranda* warnings are given after the polygraph but before further questioning, the initial *Miranda* warnings and waiver must be supplemented by not only advising the defendant that anything he says or does during the questioning may be used against him, and that he may stop answering questions or speak to a lawyer at any time, but must advise the defendant that questions may be asked after the polygraph examination had been completed.

ditional *Miranda* warning between the polygraph and the immediately subsequent questioning, or the government has explicitly advised the defendant prior to the polygraph that he may undergo questioning after the polygraph examination. Apparently, this rule obtains regardless of whether the defendant might be considered to understand completely his rights to remain silent and to have an attorney present at any time. *See Fields v. Wyrick, supra*, at 163 (Ross, J., dissenting). As I noted in *Fields*, the majority in *Fields* failed to offer convincing support for such a rule.[5]

Moreover, I believe that any attempt to distinguish the instant case from *Fields* would result in reliance on the kind of irrelevant factual differences which characterizes the majority's attempt in *Fields* to distinguish this court's prior opinion in *United States v. Little Bear, supra*. In *Little Bear* the defendant was questioned by BIA agents concerning her husband's death.

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[5] Although the majority in *Fields* refers to the Supreme Court's recent decision in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) as somehow providing some support for its holding in *Fields*, *see, e.g., Fields v. Wyrick*, supra, at 158, I am at a loss to see how *Edwards* has any relevance whatsoever to the questions presented in *Fields* or in the instant case. Moreover, the majority in *Fields* appears to admit this when it states: "The per se rule enumerated in *Edwards* does not resolve the issue present here," since Fields "initiated further dialogue with the authorities after his right to counsel had been invoked." *Fields v. Wyrick, supra*, at 158.

As the Supreme Court noted in *Edwards*

> *If *** in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be "interrogation." In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and inteligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.*

She was fully advised of her constitutional rights and signed a waiver form. Two months later she was again questioned, this time by an FBI agent, and she consented to take a polygraph examination. Prior to taking the polygraph she was given a "Consent to be Interviewed with Polygraph" form which she signed. She was also advised by the agent of her constitutional rights and she signed that form's waiver provision. During the polygraph examination Little Bear was asked if she stabbed her husband. She responded in the affirmative and said she wanted to talk about it. At this point she was not reminded of her right to an attorney or to remain silent. Upon further interrogation, Little Bear signed a written confession. On appeal, Little Bear contended that the confession should have been suppressed because it was not voluntarily given under the circumstances. This court held that the trial court did not err in concluding that "Mrs. Little Bear had voluntarily confessed and knowingly and intelligently waived her rights even though no second, post-polygraph *Miranda* warning was given." 583 F.2d at 414.

In distinguishing *Little Bear*, the majority in *Fields* relied primarily on the fact that "Little Bear had not retained counsel when she went to take the polygraph," and therefore, "the Court was not required to determine whether the agent's procedure had deprived Little Bear of a previously asserted right to deal with the authorities through counsel." *Fields v. Wyrick*, *supra*, at 161, n. 13. However, it must be noted that Fields, although retaining counsel, had not asserted his right to counsel at the polygraph examination, and in fact, as the majority noted in *Fields*, must be viewed as having initiated the further dialogue with authorities. *Id.* at 158. As the Supreme Court's opinion in *Edwards v. Arizona* clearly indicates, in either the *Little Bear* factual circumstances or the *Fields* factual circumstances, the basic standard for determining the voluntariness of

the confession is the same, i.e., "whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver is knowing and intelligent *** under the totality of the circumstances ***," 451 U.S. at 486 n.9, 101 S.Ct. at 1885 n.9 *See id.* at 482, 101 S.Ct. at 1883.

The majority in *Fields* also appears to have found some distinguishing significance in the label attached to and the wording of the form Little Bear signed in consenting to the polygraph examination. The FBI form which Little Bear signed was entitled "Consent to be Interviewed with Polygraph" and stated that she agreed to the "use of a polygraph *** during this interview or any part of it." *United States v. Little Bear, supra*, 583 F.2d at 412. The majority in *Fields* construed this form to somehow indicate a broader scope of consent to be interrogated than did the CID form in *Fields*.

First, it must be emphatically noted that there is absolutely no indication in the opinion in *Little Bear* that the court's decision even remotely turned on the wording of the FBI polygraph consent form. Furthermore, placing any legal or practical significance upon the use of the word "interview" in the FBI consent *form* used in *Little Bear* appears to raise inconsequential form over real substance.

Little Bear, *Fields* and the instant case all involve factual circumstances in which a defendant has clearly and fully been advised on at least two occasions prior to the administration of the polygraph of the constitutional rights to remain silent and to the presence of counsel during any questioning by the authorities. Furthermore, I can find no evidence in any of these cases that the defendants did not fully comprehend the meaning and the consequences of a waiver of those rights. As I stated in *Fields*, in these circumstances, "it is difficult to understand *** how one more recitation of *Miranda*

warnings would prove knowing and intelligent waiver if waiver of two prior sets of warnings, one of which was given minutes before [an incriminating statement is made] does not." *Fields v. Wyrick*, *supra*, at 163 (Ross, J., dissenting). Nevertheless, *Fields* seems to dictate that, in the circumstances of this case, another *Miranda* warnings should have been given between the polygraph examination and the following interrogation in order to find Eagle Elk's confession voluntary. For this reason, I am compelled to concur in the court's holding in the instant case that Eagle Elk's incriminating statement made during the post-polygraph questioning was not voluntarily made, and, consequently, his conviction obtained through the use of that statement must be reversed.

JOHN R. GIBSON, Circuit Judge, concurring.

I concur in the per curiam opinion of the court only because *Fields v. Wyrick*, 682 F.2d 154 (8th Cir. 1982) requires this action. I agree with Judge Ross in his specially concurring opinion that *Fields v. Wyrick* is in conflict with *United States v. Little Bear*, 583 F.2d 411 (8th Cir. 1978). *Fields v. Wyrick*, *supra*, relies on *Henry v. Dees*, 658 F.2d 406 (5th Cir. 1981) although, unlike *Henry*, it did not involve a defendant with limited mental ability. I agree with the reasoning in Judge Ross' specially concurring opinion. I am concerned that *Fields v. Wyrick* has created a per se rule that finds no waiver even when repeated *Miranda* warnings had been given.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CR 81-50050-01

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT EDWARD EAGLE ELK, JR. DEFENDANT.

TRANSCRIPT OF HEARINGS

Taken at
United States Courthouse
Rapid City, South Dakota
October 13, 1981

BEFORE HONORABLE ANDREW W. BOGUE, CHIEF JUDGE

* * * * *

[60] THE COURT: In view of the testimony given and the absence of any further testimony by the Defendant in this case, I would state this: First of all the Court did consider all the circumstances surrounding the statement, whether it is called an admission against interest or confession or not, and it doesn't appear that it would fall within the—well, I'm not going to say that. I will back off on that and say that whatever it is, a confession or admission, that this Court did consider the following circumstances, whether or not the Defendant knew of the nature of the offense which he is charged or which he has suspected at the time of making the confession; the Court did consider whether or not the Defendant was advised or knew he was not required to make any statement and any such statement would be used against him; and the Court further considered

whether or not the Defendant had been advised prior to questioning of his rights to assistance of counsel; the Court further considered the circumstances surrounding whether or not the Defendant was without assistance of counsel when questioned and when given such confession; the Court does find that the request for the polygraph was made [61] by counsel for the Defendant on behalf of the Defendant; the Court further finds that the giving of the polygraph test was voluntary.

The Court does not consider in its decision any statement on the part of any witness as to whether or not the Defendant has passed the polygraph test. I say "passed" advisably. The witness did say he felt that he—that the Defendant—was not telling the truth, or words to that effect, and that does not enter into this. It is not admissible in any Court of law to prove guilt of any Defendant, so I am not considering that.

I have some questions about polygraph tests anyway and the weight it should be given. This is not to be considered here and is not being considered here.

At any rate, the only reason it's allowed in was to show there was a test taken as part of the circumstances surrounding the obtaining of this admission or confession, whichever the case may be.

The attorney did not make any objection to the polygraph test being made in his absence. Also the Defendant did not object to the absence of his attorney while the polygraph test was being taken.

Now, the Court believes that the Miranda warnings were given properly by the party taking the statements, and the Court so finds. The court also finds that by giving a [62] statement, by discussing anything with the witness, Mr. Diem, that the Defendant knowingly and intelligently waived his privilege against self-incrimination.

Now, as to the statement which was given, the second statement, as opposed to the first statement, the Court finds that the Defendant did not request presence of his Counsel prior to the giving of the second statement. The Court further finds that the Defendant voluntarily, knowingly and intelligently waived his right to have retained or appointed Counsel present at that particular interrogation; this Court further finds the the confession or statement, whichever it may be, or admission, was really voluntarily made. The Court under the law then grants the admission or will grant the admission of the statement into evidence, but will also instruct the jury properly as required by law.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1981

No. 81-2425

Filed October 5, 1982

UNITED STATES OF AMERICA, APPELLEE,

v.

ROBERT EAGLE ELK, JR., a/k/a BOBBY BEAR, APPELLANT.

This appeal from the United States District Court for the ____ District of South Dakota was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment and commitment of the said District Court in this cause be, and the same is hereby, reversed and remanded to the said District Court with directions to order release of the appellant or provide a new trial within a reasonable period of time in accordance with the opinion of this Court

JUNE 30, 1982

A True Copy:
Attest:

/s/ ROBERT D. ST. VRAIN
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1981

No. 81-2425

UNITED STATES OF AMERICA, APPELLEE,

v.

ROBERT EAGLE ELK, JR., A/K/A BOBBY BEAR,
APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Ross and John R. Gibson would grant the petition for rehearing en banc.

August 27, 1982

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-[redacted]

UNITED STATES OF AMERICA,

Petitioner,

vs.

ROBERT EAGLE ELK, JR.,
a/k/a BOBBY BEAR,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE UNITED STATES

GARY D. JENSEN
LYNN, JACKSON, SHULTZ & LEBRUN, P.C.
P. O. Box 8110
Rapid City, SD 57701
(605)342-2592
Attorneys for Respondent

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202)633-2217
Attorney for Petitioner

LYNN, JACKSON, SHULTZ
& LEBRUN, P.C.
P.O. BOX 8110
RAPID CITY, SD 57701
605-342-2592

I

QUESTION PRESENTED FOR REVIEW

Whether the Eighth Circuit Court of Appeals erred in determining that the Government failed to meet its heavy burden of proving that a statement made by a young, inexperienced and frightened Indian defendant was made voluntarily when:

1. The statement was made after the conclusion of a polygraph examination conducted by an imposing FBI agent in an intimidating atmosphere; and

2. The statement was made after the FBI agent, using commonly employed interrogation techniques, told the defendant, among other things, that he had failed the examination "miserably"; that a welfare agency would care for his infant daughter should he go to jail; and, that he could avoid prison by claiming "self-defense" as another defendant had successfully done under similar circumstances; and

3. The record uncontradictedly reflects that the young Indian defendant consented to a polygraph examination only, not subsequent interrogation in the mandatory absence of defense counsel; and

4. The FBI agent admittedly failed to advise the young Indian defendant of his Miranda Rights after the polygraph examination and prior to launching into subsequent interrogation.

II

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TABLE OF AUTHORITIES

CASES:

Brewer v. Williams, 430 U.S. 387 (1977)..... 4,5,8

Fields v. Wyrick, 682 F.2d 154 (8th Cir. 1982).....4,6,7,9,10,11

Miranda v. Arizona, 384 U.S. 436 (1966)..... 5

State v. Faller, 227 N.W.2d 433 (S.D. 1975)..... 7

United States v. Henry, 447 U.S. 264 (1980)..... 4,7,8

Wyrick v. Fields, 51 U.S. L.Rev. 3411..... 9

OTHER AUTHORITIES:

Lykken, A Tremor in the Blood: Uses and Abuses of the Lie Detector, (1981)..... 6

IV

STATEMENT OF THE CASE

Respondent, Robert Eagle Elk, Jr. (hereinafter referred to as "Eagle Elk"), does not take issue with the Government's Statement of the Case except for the Government's omission of several material facts. Those facts are:

1. Eagle Elk is a young, inexperienced Indian with no prior criminal record; no prior contact with FBI agents; and no prior experience with polygraph examinations.

2. The polygraph examination was conducted in an intimidating atmosphere. The examination was conducted in a small FBI office in the Rapid City Federal Building. Eagle Elk was alone with the FBI agent during the examination. (Transcript 5; 9)

3. Eagle Elk's first court-appointed lawyer (who withdrew before trial because of a conflict) was not present when the FBI agent read Eagle Elk his Miranda Rights prior to the polygraph examination and when Eagle Elk, prior to the two and one-half to three hour examination, executed the Waiver of his Miranda Rights and Consent to take the polygraph examination. (Transcript 10)

4. The FBI agent, using commonly employed interrogation techniques and in an effort to create an atmosphere likely to result in Eagle Elk making an incriminating statement in the mandatory absence of counsel, told Eagle Elk that he had failed the polygraph examination "miserably". (Transcript 14-15)

5. The FBI agent, in addition to advising Eagle Elk that he had failed "miserably", told Eagle Elk that someone

would take care of his little daughter if Eagle Elk should go to jail. The FBI agent also suggested to Eagle Elk that he could successfully avoid prison by claiming "self-defense" because another defendant, a woman, had done so under similar circumstances. (Transcript 16; 35-36)

6. Eagle Elk, being a young Indian boy with no prior experience in courtrooms or with FBI agents, was nervous during the polygraph examination. (Transcript 30)

7. Prior to the polygraph examination, Eagle Elk made a statement consistent with the defense brought forward at trial, namely that the other individual with Eagle Elk and the deceased was responsible for killing the deceased. The FBI agent failed to record in any fashion whatsoever the substance of this prior, exculpatory statement. Neither could the agent "recall" the substance of the first statement. (Transcript 28-29; 38-39)

The foregoing facts, curiously omitted from the Government's Petition, are obviously relevant to the issue before this Court. All of these facts demonstrate the imposing and intimidating atmosphere Eagle Elk faced and the resulting involuntariness of his statement.

V

SUMMARY OF THE ARGUMENT

The Eighth Circuit Court of Appeals properly decided that the United States of America, through an FBI agent, cannot use a polygraph examination as a "psychological rubber hose" to pound an incriminating statement out of a young and inexperienced Indian defendant who, at the time he gave his statement, was alone with an imposing FBI agent in an intimidating FBI office.

In support of the decision of the Eighth Circuit Court of Appeals, Eagle Elk first reminds this Court that the Government has a "heavy burden" of proof to meet in order to establish that an incriminating statement was made voluntarily. In support of the Eighth Circuit Court of

Appeals' determination that the Government failed to meet that burden here, Eagle Elk calls upon the scientific study called upon by the Eighth Circuit Court of Appeals to illustrate what every judge and competent criminal trial lawyer takes for granted, namely that the Government uses the polygraph examination as an excuse to create an environment which will probably result in the defendant's making of an incriminating statement in the absence of defense counsel.

For additional support, Eagle Elk also calls upon case authority from another jurisdiction which has recognized the obvious, namely that a polygraph examination is a "psychological rubber hose" used to psychologically coerce a criminal defendant into making an incriminating statement.

Furthermore, while this Court has not addressed the specific issue and the decisions of this Court cited by the Government are largely irrelevant (until Fields, infra), Eagle Elk also calls upon two of this Court's decisions, namely Brewer v. Williams, 430 U.S. 387 (1977) and United States v. Henry, 447 U.S. 264 (1980) in support of the decision rendered by the Eighth Circuit Court of Appeals.

Finally, Eagle Elk demonstrates that the Court's decision here need not mirror that recently rendered by the Court in Fields v. Wyrick, 682 F.2d 154 (8th Cir. 1982), because of the material factual differences which exist between the cases.

VI

ARGUMENT

THE EIGHTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT THE STATEMENT SHOULD HAVE BEEN SUPPRESSED.

A. Preliminary Remarks.

It is difficult to believe that the Government is serious and acting in good faith in advancing the proposition that it advances here. Reduced to its lowest level, that of practical application, the Government urges this Court to

accept the proposition that the Government can use a polygraph examination as a pretense to gain access to a defendant, outside of the presence of defense counsel, by design and thereafter use all of its interrogation tricks to pry an incriminating statement out of a defendant. Such a proposition is clearly unacceptable and improper under the law. It is also unnecessary to effective law enforcement. The Eighth Circuit Court of Appeals recognized the same in reaching the result it did here.

B. Heavy Burden on Government.

This Court must never lose sight of the well-established principle that the Government has a "heavy burden" of proof to meet in establishing that an incriminating statement was made voluntarily. See Brewer v. Williams, 430 U.S. 387, 403 (1977). This Court has repeatedly emphasized the "heavy burden" it has placed on the Government since its decision in Miranda v. Arizona, 384 U.S. 436, 475 (1966), when the Court stated:

> Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

As the Eighth Circuit Court of Appeals recognized, the Government failed to meet that burden here. That failure existed here because the Government improperly used a polygraph examination and additional interrogation techniques to psychologically pound an incriminating statement out of Eagle Elk.

C. Insidious Use of Polygraph Examination.

Scientists who have studied the Government's use of polygraph examinations have concluded the obvious, namely that the Government uses polygraph examinations and additional interrogation techniques to illicit incriminating statements from criminal defendants who have been lured away

from defense counsel. One of those scientists, Professor Lykken, was referred to by the Eighth Circuit Court of Appeals in Fields:

> It has been suggested that the primary utility of polygraphs administered in the course of a criminal investigation is to induce confessions from the accused. See Lykken, A Tremor in the Blood: Uses and Abuses of the Lie Detector, 214-15 (1981). See Fields at 159.

In support of its statement, the Eighth Circuit made a reference to a special study conducted by Professor Lykken:

> Professor Lykken cites, for example, the experience of the Los Angeles Police Department polygraph laboratory. Their examiners estimate that they obtain confessions from twenty-five percent of the suspects subjected to polygraph tests. See n. 7 of Fields.

As the Court of Appeals went on to imply, their appears to be little other reason for the Government's use of polygraph examinations. The test results are obviously not admissible because of their inherent unreliability.

As the Court concluded, however, the scientific unreliability of the polygraph examination does not lessen the psychological impact upon an individual who has been given such an examination and advised of unfavorable test results:

> The questionable reliability of so-called 'lie-detectors' does not, however, diminish the significant psychological impact the device can have on the examinee. See Lykken, supra, at 211-12. It may seem futile to maintain silence in the face of the examiner's statement that the machine, cloaked with the mystique of scientific infallibility, has shown the accused to be lying. Furthermore, the examiner is not likely to be challenged by the accused when he indicates that the machine has shown 'some deceit;' the accused, and frequently the court reviewing the circumstances of a polygraph-induced confession, has no way of knowing what, in fact, the test results revealed. Fields at 159.

Accordingly and as held by the Eighth Circuit Court of Appeals here, Miranda Rights should be given following a polygraph examination and before subsequent interrogation to insure that the defendant has not succumbed to the

psychological pressure imposed upon him by the examination, a report of unfavorable results, and additional interrogation techniques. As stated by the South Dakota Supreme Court:

> The situation a lie detector test presents can best be described as a psychological rubber hose. A defendant, when suddenly faced with the impersonal accuracy of a machine, may believe it is safer to confess and place himself at the mercy of the law rather than lie to the examiner and sacrifice any possibility of leniency. Under circumstances such as this we find it difficult to believe that a confession is voluntary unless it can be shown the defendant knows his constitutional rights and knows that his interests cannot be harmed by exercising those rights. When asked the right questions a defendant may confess if he believes he can be convicted by his own silence. See State v. Faller, 227 N.W.2d 433, 435 (S.D. 1975).

Inasmuch as Eagle Elk was not given his Miranda Rights after his polygraph examination and before subsequent interrogation and in view of the additional circumstances set out above (Eagle Elk's young age and inexperience; the intimidating setting; and the interrogation techniques used by the FBI agent), the Eighth Circuit properly determined that the Government failed to meet its "heavy burden" of proving that Eagle Elk's incriminating statement was made voluntarily.

D. Government Case Authority.

Although none of the cases cited by the Government in its Petition deal specifically with incriminating statements made subsequent to polygraph examinations (and, indeed, this Court has never been faced with this specific issue until its Fields decision discussed infra), a close review of the language used in two of those cases support the decision of the Eighth Circuit Court of Appeals here.

For example, in the case of United States v. Henry, 447 U.S. 264 (1980), this Court held that a defendant's incriminating statements made in prison to a paid, Government informer were not made voluntarily and should therefore have been suppressed. The critical point upon which the Court

seized and utilized in its reasoning was the Government's deliberate and intentional creation of an environment which was likely to induce the defendant to make incriminating statements without the assistance of counsel. As the Court stated as 274-75:

> Under the strictures of the Court's holdings on the exclusion of evidence, we conclude that the Court of Appeals did not err in holding that Henry's statements to Nichols should not have been admitted at trial. By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel. This is not a case where, in Justice Cardozo's words, 'the constable . . . blundered,' (citation omitted); rather, it is one where the 'constable' planned an impermissible interference with the right to the assistance of counsel.

The same situation exists in this case. Here, the Government, by use of a polygraph as with the use of a paid informant in Henry, also "intentionally created a situation likely to induce [Eagle Elk] to make incriminating statements without the assistance of counsel . . . Similarly, this is not a case where the Government simply "blundered". Rather, it is one where the "'constable' planned an impermissible interference with the right to the assistance of counsel".

The same result is required by Brewer v. Williams, 430 U.S. 387 (1977). There, this Court held inadmissible an incriminating statement made by defendant to a law enforcement officer after the law enforcement officer disregarded defense counsel's instructions not to interrogate the defendant and played upon the emotions of the defendant while he was alone with the law enforcement officer. In discussing the role played by the law enforcement officer's clever play upon the defendant's emotions, this Court stated as 402-403:

> Moreover, the statements were obtained only after Detective Leaming's use of psychology on a person whom he knew to be deeply religious and an escapee from a mental hospital -- with the specific intent to rlicit incriminating statements. In the face of this evidence, the State

> has produced no affirmative evidence whatsoever to support its claim of waiver, and, a fortiori, it cannot be said that the State has met its 'heavy burden' of showing a knowing and intelligent waiver of . . . Sixth Amendment rights.

The same tactics were used here and resulted in an incriminating statement being made by Eagle Elk. In this case, the FBI agent, using commonly known interrogation techniques, played upon Eagle Elk's emotions by:

(1) intimidating Eagle Elk by telling him that he had failed the polygraph examination 'miserably'; and

(2) advising Eagle Elk that a welfare agency would take care of Eagle Elk's infant girl if Eagle Elk should go to jail; and

(3) advising Eagle Elk that he could probably avoid prison in any event by claiming "self-defense" as had been successfully done by another defendant under similar circumstances.

The fact of the matter is that the Government used the polygraph examination as a pretense, overtly exceeded the consent given by Eagle Elk and his counsel and then played upon Eagle Elk's emotions in the absence of counsel to pry an incriminating statement out of Eagle Elk. The Eighth Circuit Court of Appeals recognized the impropriety of proceeding in such a fashion. Eagle Elk urges this Court to also recognize the obvious.

E. Fields Decision.

Counsel for Eagle Elk has been apprised of the fact that this Court recently (November 29, 1982) reversed the decision of the Eighth Circuit Court of Appeals in Fields, the decision relied upon here by the Eighth Circuit. The factual differences between Fields and here, however, merit a different result being reached here by this Court.

This Court reversed the Eighth Circuit decision in Fields because:

> [t]he Court of Appeals did not examine the 'totality of circumstances,' as Edwards requires. Wyrich v. Fields, 51 U.S. L.Rev. 3411.

Upon considering the "totality of the circumstances" here, it is obvious that the Eighth Circuit Court of Appeals reached the proper result in this case.

There are four material differences in "circumstances" between Fields and here which not only justify, but compel affirmance of the decision of the Eighth Circuit Court of Appeals here.

The first material difference between Fields and this case is the nature of the defendant and the nature of the examiner. In Fields, the defendant was a white military man who submitted to a polygraph examination by another military man. Therefore, Fields was familiar and comfortable with the surroundings in which the examination was conducted. Nothing to the contrary exists in the Fields opinion.

In the present case, the situation is very different. Eagle Elk is a young and inexperienced Indian boy who submitted to an examination by an FBI agent, a representative of a Government agency Eagle Elk had no prior experience with and, in fact, was extremely intimidated by.

Because Eagle Elk found himself in an unfamiliar and intimidating setting, he, as opposed to Fields, was extremely apprehensive and nervous during and following the polygraph examination.

The second material difference between the factual situation presented in Fields and here centers around the physical setting in which the polygraph examination was conducted. In Fields, there is no reference nor mention made of a small, intimidating office being the site of the polygraph examination. Here, on the other hand, the FBI agent admitted that the polygraph examination was conducted in a small FBI office located in the Federal Building in Rapid City, South Dakota. He admitted that he and Eagle Elk sat approximately three feet apart during the entire examination and interrogation process.

The third material difference between the factual

situation presented in Fields and that presented here is in the nature of the interrogation conducted by the polygraph examiner subsequent to the polygraph examination. In Fields, the examiner simply advised the defendant that some of his responses were "deceptive". Here, the FBI agent intimidated Eagle Elk by telling Eagle Elk that he had failed the examination "miserably". Using additional, well-known interrogation techniques, the FBI agent then went on to reassure Eagle Elk that his infant girl would be taken care of if Eagle Elk went to jail. The FBI agent also attempted to lull Eagle Elk into a false sense of security by advising Eagle Elk that he could probably avoid prison in any event by claiming "self-defense" as another defendant had done in the recent past under similar circumstances.

Finally, the fourth material difference is that Eagle Elk's lawyer could not, by FBI policy, be present during the examination.

These four material differences in circumstances (the nature of the defendant and examiner; the nature of the physical setting; the nature of the interrogation conducted; and the fact that Eagle Elk's lawyer could not be present), while perhaps insignificant to the battle scarred judge or trial lawyer, are obvious in their significance to a young, inexperienced and scared Indian defendant such as Eagle Elk. These differences are more than ample justification for this Court to reach a result here which is contrary to that reached in Fields.

The circumstances here render it impossible for a court to conclude that Eagle Elk's statement was voluntary. Because of the FBI mandatory policy that defense counsel not be present for the examination and the resulting intimidating circumstances, this Court should require the FBI to do nothing other than conduct a polygraph examination. Comments during and following the examination should not be allowed. The FBI should be held to that which they have been given consent to do, namely conduct a polygraph examination.

VII

CONCLUSION

Accordingly, Eagle Elk strongly urges this Court to deny the Government's Petition for Writ of Certiorari.

Respectfully submitted this 30th day of December, 1982.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

BY: _____
Gary D. Jensen
Attorneys for Respondent
P. O. Box 8110
Rapid City, SD 57701

AFFIDAVIT OF SERVICE

State of South Dakota:
ss
County of Pennington :

I, Gary D. Jensen, a member of the Bar of the State of South Dakota and of the United States District Court for the District of South Dakota and of the United States Court of Appeals for the Eighth Circuit, and counsel of record for Robert Eagle Elk, Jr., a/k/a Bobby Bear, Respondent above named, hereby certify that on the 30th day of December, 1982, pursuant to Rule 28, Rules of the Supreme Court of the United States, I served one copy of the foregoing Response to Petition for Writ of Certiorari on Rex E. Lee, by depositing such copy in the United States Post Office, Rapid City, South Dakota, with first class postage prepaid, properly addressed to the post office of Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20503, the above-named Petitioner's counsel of record.

Therefore, all parties required to be served have been served in accordance with Rule 28.3, Rules of the Supreme Court of the United States.

Dated this 30th day of December, 1982.

_____
Gary D. Jensen

Subscribed and sworn to before me this 30th day of December, 1982.

_____
Notary Public, South Dakota
My Commission Expires: 12-17-1990

(SEAL)

ORIGINAL

RECEIVED
JAN 3 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-

UNITED STATES OF AMERICA,

Petitioner,

vs.

ROBERT EAGLE ELK, JR.,
a/k/a BOBBY BEAR,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, in accordance with the provisions of Title 28, United States Code, §1915, and Rule 46 of the Rules of the Supreme Court of the United States, hereby moves the Court for an Order granting Respondent leave to proceed in forma pauperis in responding to the Petition for Writ of Certiorari filed by the United States of America.

In support of said Motion, the undersigned respectfully represents and certifies to the Court that the Honorable James H. Wilson, U. S. Magistrate in and for the United States District Court for the District of South Dakota, previously entered an Order allowing Respondent to proceed in forma pauperis for the trial of this case. A copy of said Order is attached hereto, marked "Exhibit A" and by this reference made a part hereof as though fully set forth herein.

The undersigned further represents and certifies to the Court that the undersigned's representation of the Respondent was continued through the appellate process in the United States Court of Appeals for the Eighth Circuit by court-appointment, a copy of said Order being attached hereto, marked "Exhibit B" and by this reference made a part hereof as though fully set forth herein.

LYNN, JACKSON, SHULTZ & LEBRON, P.C.
P.O. BOX 8250
RAPID CITY, SD 57709
605-343-5263

Finally, the undersigned also represents and certifies to the Court that the Respondent was incarcerated for approximately nine months after his trial (until October 4, 1982) during which time he obviously remained indigent. Since his release, the Respondent has diligently searched for, but has been unable to find employment and, therefore, remains indigent. Consequently, the financial condition of the Respondent on the undersigned's information and belief, has not substantially improved and he is entitled to proceed herein in forma pauperis to obtain the relief he is entitled to and to respond to the Petition for Writ of Certiorari filed by the United States of America without printing the same.

Respectfully submitted this 30th day of December, 1982.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

BY: _____
Gary D. Jensen
Attorneys for Respondent
P. O. Box 8110
Rapid City, SD 57701

AFFIDAVIT OF SERVICE

State of South Dakota:
ss
County of Pennington :

I, Gary D. Jensen, a member of the Bar of the State of South Dakota and of the United States District Court for the District of South Dakota and of the United States Court of Appeals for the Eighth Circuit, and counsel of record for Robert Eagle Elk, Jr., a/k/a Bobby Bear, Respondent above named, hereby certify that on the 30th day of December, 1982, pursuant to Rule 28, Rules of the Supreme Court of the United States, I served one copy of the foregoing Motion for Leave to Proceed in Forma Pauperis on Rex E. Lee, by depositing such copy in the United States Post Office, Rapid City, South Dakota, with first class postage prepaid, properly addressed to the post office of Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20503, the above-named Petitioner's counsel of record.

Therefore, all parties required to be served have been served in accordance with Rule 28.3, Rules of the Supreme Court of the United States.

Dated this 30th day of December, 1982.

Gary D. Jensen

Subscribed and sworn to before me this 30th day of December, 1982.

Notary Public, South Dakota

(SEAL)

My Commission Expires:

CJA 20 Appointment & Voucher for Counseling Services

APPOINTMENT

IN UNITED STATES ☒ MAGISTRATE ☐ DISTRICT ☐ APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF: U.S.A. vs. Robert Eagle Elk

FOR: Western Div., District of SD

AT: Rapid City, SD

LOCATION NUMBER: 41105

PROCEEDING (describe briefly)

CHARGE/OFFENSE (describe if applicable & check box *) ☒ Felony ☐ Misdemeanor
voluntary manslaughter

U.S. or other code citation

1 ☒ Defendant – Adult
2 ☐ Defendant – Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☐ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness
9 ☐ Other (Specify Below)

DOCKET NUMBERS
Magistrate: 81-082 M
District Court: 81-50050-01
Court of Appeals:

VOUCHER NUMBER: 498278

PERSON REPRESENTED (Show full name & status, & check box *)

Name already appears as ☐ PI or as ☐ DF above

COURT ORDER

☐ APPOINTING COUNSEL
☐ RATIFYING PRIOR SERVICE
☐ EXTENDING APPOINTMENT FOR APPEAL
☒ SUBSTITUTING COUNSEL FOR (name of prior counsel) Jon Mattson (date appt'd.)

Because the above named "person represented" has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel, and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney or organization printed here and below

Gary D. Jensen

is hereby appointed to represent this person in the above designated case.

If appointment is made by a magistrate and the case subsequently proceeds to U.S. District Court, the appointment shall remain in effect until terminated or a substitute attorney is appointed.

The attorney or organization herein appointed is authorized to claim reimbursement on this form, subject to applicable law, administrative regulations, and the plan of the court.

Signature of U.S. Judge or Magistrate: [signature] Date: 7-27-81

OR BY ORDER OF THE COURT

(Clerk or Deputy)

TIME & EXPENSES VOUCHERED BELOW

I. IN OPEN COURT			
A. Commitment & Or Plea			
B. Motions & Hearings			
C. Bail Hearings		.25	
D. Sentence Hearings		21.50	30.00
E. Trial			
F. Revocation Hearings			
Other Hearings	Suppression hearing	2.50	
TOTAL IN COURT HOURS		24.25	727.50
II. OUT OF COURT			
A. Interviews & Conferences		49.4	
B. Obtaining & Reviewing Records		4.0	
C. Legal Research & Brief Writing		6.7	20.00
D. Travel Time	Preparation & receipt of corres. & pleadings; review & consideration of file; trial preparation	59.9	
E. Investigative & Other Work		4.0	
(See attached Statement)		124.0	2,480.00
TOTAL OUT OF COURT HOURS			3,207.50
TOTAL AMOUNT CLAIMED			

(See attached statement)

TOTAL TRAVEL EXPENSES	521.38
TOTAL OTHER EXPENSES	3,729.88
LESS AMOUNT PAID	-0-
NET AMOUNT CLAIMED	3,728.88

DATE: 2-18-82 AMOUNT APPROVED:

COUNSEL { IS A PRIVATE ATTORNEY / IS FURNISHED BY: COMMUNITY DEFENDER ORGANIZATION / BAR ASSOCIATION OR LEGAL AID AGENCY

PHONE NO. (605) 342-2592

VOUCHER NUMBER: 498278

SOCIAL SECURITY NO. 503-58-8754

X [signature]

ATTORNEY / ORGANIZATION / ADDRESS:
Gary D. Jensen
Attorney at Law
P.O. box 8110
Rapid City, SD

ZIP CODE 57701

AT TIME OF APPOINTMENT PLEASE TYPE OR PRINT CLEARLY THE NAME OF ATTORNEY OR ORGANIZATION (PAYEE) AND THE ADDRESS TO WHICH CHECK SHOULD BE MAILED

EXHIBIT "A"

Copy 3-Retained by Attorney

Approved by U.S. Treasury - April 1971

APPOINTMENT

IN UNITED STATES ☐ MAGISTRATE ☐ DISTRICT ☒ APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF: United States vs. Robert Eagle Elk, Jr., etc.

FOR: Eighth Circuit

AT: St. Louis, Missouri

LOCATION NUMBER: 25001

PROCEEDING (describe briefly): Appeal.

CHARGE/OFFENSE (describe if applicable & check box →): ☒ Felony ☐ Misdemeanor

Voluntary Manslaughter.

U.S. or other code citation ▶ 18 USC § 1153 & 1112

1 ☐ Defendant – Adult
2 ☐ Defendant – Juvenile
3 ☒ Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☐ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness
9 ☐ Other (Specify Below)

DOCKET NUMBERS
Magistrate:
District Court: S.D. CR-81-50050-0
Court of Appeals: 81-2425

VOUCHER NUMBER: 683644

PERSON REPRESENTED (Show full name & status, & check box →)

Robert Eagle Elk, Jr.

Name already appears as ☐ Pl. or as ☐ Df. above

COURT ORDER

☐ APPOINTING COUNSEL
☐ RATIFYING PRIOR SERVICE
☒ EXTENDING APPOINTMENT FOR APPEAL
☐ SUBSTITUTING COUNSEL FOR
(Name of prior counsel) (Date appt'd.)

Because the above named "person represented" has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel, and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney or organization printed here and below

Gary D. Jensen

is hereby appointed to represent this person in the above designated case.

If appointment is made by a magistrate and the case subsequently proceeds to U.S. District Court, the appointment shall remain in effect until terminated or a substitute attorney is appointed.

The attorney or organization herein appointed is authorized to claim reimbursement on this form, subject to applicable law, administrative regulations, and the plan of the court.

Signature of U.S. Judge or Magistrate

Date 12/24/81

OR BY ORDER OF THE COURT (Clerk or Deputy)

CLAIMED VOUCHERED BELOW

	TIME SPENT	DATES	HOURS	AMOUNT
I IN OPEN COURT				
A ARRAIGNMENT &/OR PLEA			RATE PER HR. $	HOURS TIMES RATE
B MOTIONS & REQUESTS				
C BAIL HEARINGS				
D SENTENCE HEARINGS				
E TRIAL				
F REVOCATION HEARINGS				
G APPEALS COURT				
H OTHER (Specify below)				
TOTAL "IN COURT" HOURS			▶	$
II OUT OF COURT				
A INTERVIEWS & CONFERENCES			$	
B OBTAINING & REVIEWING RECORDS				
C LEGAL RESEARCH & BRIEF WRITING				
D INVESTIGATIVE & OTHER WORK (Specify)				
E TRAVEL TIME (Driving normal office hours only) TO FROM COURT (Not allowable if no court appearance for which TRAVEL TIME Claimed)				
TOTAL "OUT OF COURT" HOURS			▶	$
TOTAL COMPENSATION FOR "IN COURT & OUT OF COURT" TIME			▶	$
III ITEMIZED EXPENSES (Specify on supplemental sheet)			AMT. PER ITEM $	
TOTAL ITEMIZED EXPENSES			▶	$
TOTAL COMPENSATION & EXPENSES			▶	$
If more than one attorney has been appointed, indicate if this is for:			DEDUCT ADVANCE PAYMENTS PREVIOUSLY PAID IF APPLICABLE	
			NET AMOUNT CLAIMED ▶	$

CERTIFICATIONS OF ATTORNEY/PAYEE

Have compensation and/or reimbursement for work in this case ☐ Yes ☐ No
Have you received any other payment (compensation or anything of value) from any source in connection with your representation? If "Yes," how much have you received? $
Do you anticipate receiving additional payment?
If this is an appointment where you represent more than one person in this court, are you representing other persons in this case? ☐ Yes ☐ No

SIGNATURE OF ATTORNEY/PAYEE: I SWEAR & AFFIRM THE TRUTH & CORRECTNESS OF ABOVE STATEMENTS ▶ DATE

AMOUNT CERTIFIED/APPROVED

APPROVED FOR PAYMENT
SIGNATURE OF JUDGE/MAGISTRATE ▶ DATE
SIGNATURE OF CHIEF JUDGE COURT OF APPEALS ▶ Payment in excess of statutory limitation approved under 18 USC 3006A(d)(3) DATE
AMT. APPROVED $

COUNSEL { X IS A PRIVATE ATTORNEY / IS FURNISHED BY: ☐ COMMUNITY DEFENDER ORGANIZATION ☐ BAR ASSOCIATION OR LEGAL AID AGENCY

PHONE NO. (605) 342-2592

SOCIAL SECURITY NO. 503-58-9754

VOUCHER NUMBER ▶ 683644

HAS DEFENDANT PAID ANY MONEY TO YOU SINCE HIS ARREST, OR TO YOUR KNOWLEDGE, TO ANYONE ELSE, IN CONNECTION WITH THE OFFENSE FOR WHICH YOU WERE APPOINTED TO DEFEND HIM? IF SO, GIVE DETAILS.

AT TIME OF APPOINTMENT PLEASE TYPE OR PRINT CLEARLY THE NAME OF ATTORNEY OR ORGANIZATION (PAYEE) AND THE ADDRESS TO WHICH CHECK SHOULD BE MAILED

ATTORNEY / ORGANIZATION:
Mr. Gary D. Jensen
Attorney at Law

ADDRESS:
Post Office Box 8110
Rapid City, South Dakota

ZIP CODE 57701

EXHIBIT B

Answer.